

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARY D. INGRAM : CIVIL ACTION  
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 v. :  
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 JO ANNE B. BARNHART : NO. 01-263

MEMORANDUM

Dalzell, J

January 16, 2002

Plaintiff, Mary Ingram, appeals the decision of the Commissioner of Social Security denying her claim for disability insurance benefits (DIB) and supplemental security income (SSI). Ingram testified at her administrative hearing that she suffered from depression, anxiety, stress, and the pressure of caring for her daughter who was terminally ill. Tr. at 39. Also in evidence at that hearing was the testimony of an expert medical witness and evaluations and diagnoses of Mary Ingram's treating physicians and expert agency consultants. Tr. at 33-57 (hearing testimony); Tr. at 58-240 (hearing exhibits).

The administrative law judge (ALJ) found that Ingram had several mental impairments: severe atypical depression, personality disorder, and adjustment disorder. Tr. at 24. He determined that these precluded Ingram from resuming her former job as a certified nursing assistant. Id. Nevertheless, the ALJ determined that Ingram was not disabled under the Social Security Act because she was able to perform "other" "substantial gainful work," 42 U.S.C. § 423(d)(2)(A), specifically, "simple, routine work in a low stress environment" including such jobs as office cleaner, packer, and sorter. Tr. at 24-25.

Ingram appealed the adverse disability decision to the Appeals Council. The Appeals Council denied review, rendering the decision of the ALJ the final decision of the Commissioner. Ingram filed this appeal pursuant to 28 U.S.C. § 405(g); we referred the appeal to Magistrate Judge Charles B. Smith.

Judge Smith issued a Report and Recommendation recommending remand to the Commissioner. Judge Smith deemed the record to be incomplete as to whether Ingram was capable of engaging in simple and routine employment on a regular and continuing basis. R&R 10-12. The Commissioner objected to the Report in its entirety. Obj. at 1.

After careful and independent review of the record, we find that the decision of the Commissioner that Ingram was able, despite her mental impairments, to engage in substantial gainful work on a regular and continuous basis was supported by substantial evidence. We therefore sustain the Commissioner's Objections, disapprove the Report and Recommendation, and will enter Judgment for the Commissioner.

#### I. Standard of Review

We review the factual finding of the Commissioner under a substantial evidence standard. See 42 U.S.C. § 405(g) (stating that "the findings of the Commissioner of Social Security, as to any fact, if supported by substantial evidence, shall be conclusive"). Substantial evidence means "less than a preponderance of the evidence but more than a mere scintilla."

Jesurum v. Sec'y of the United States D.H.H.S., 48 F.3d 114, 117 (3d Cir. 1995). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. (quotation omitted). "We will not set the Commissioner's decision aside if it is supported by substantial evidence, even if we would have decided the factual inquiry differently." Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999).

We review the portions of the magistrate judge's decision to which objections have been filed de novo. 28 U.S.C. § 636(b). We "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate," as appropriate. Id.

## II. Discussion

Once it is demonstrated that a claimant is unable to return to her former job by reason of a mental or physical impairment, the burden shifts to the Commissioner to prove that there is some other kind of substantial gainful employment the claimant is able to perform, taking into account the claimant's mental or physical limitations, age, education, and prior work history. Kangas v. Sec'y of Health & Human Servs., 823 F.2d 775, 777 (3d Cir. 1987).

Our inquiry into substantial gainful employment is two-fold. We must assess whether the claimant is able to perform the physical and mental requisites of a job and also assess whether the claimant is able to perform a job "on a regular and

continuing basis." 20 C.F.R. § 416.945(c); Wright v. Sullivan, 900 F.2d 675, 682 (3d Cir. 1990); Kangas, 823 F.2d at 777. Our review of the record here compels us to conclude that the ALJ was justified in finding that, in both respects, Ingram was able to perform substantial gainful work, thereby disqualifying her from meeting the statutory standard for "disability" under 42 U.S.C. § 423(d).<sup>1</sup>

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<sup>1</sup> Under the Social Security Act, "An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy...." 42 U.S.C. § 423(d)(2)(A). Our review of the ALJ decision is limited to the factual finding that Mary Ingram was able to engage in other substantial gainful work.

Ingram appealed the ALJ decision as to another issue as well - the determination that Ingram's impairments did not fall under listed impairments. See 20 C.F.R. § 404.1520(d); Morales v. Apfel, 225 F.3d 310, 316 (3d Cir. 2000) (explaining that if a claimant's impairment meets or exceeds a listed impairment in Appendix I of sub-part P of Regulations No. 4 of the Code of Regulations, she is disabled, without regard to whether she is able or unable to perform substantial gainful work). Ingram did not file objections to Judge Smith's denial of her appeal on this ground. See Resp. to Obj. at 3 (stating that since the Magistrate Judge recommended remand, she did not object to his failure to find that she labored under a listed impairment). Furthermore, we find Ingram's appeal as to this issue is not meritorious. Ingram does not identify what listed impairment the ALJ should have found. She argues that he did not bolster his opinion with reasoning and therefore his determination is defective as a matter of law under Burnett. See Burnett v. Comm'r of Social Security Admin., 220 F.3d 112, 119 (3d Cir. 2000) (holding that ALJ erred in "making only a conclusory statement without mentioning any specific listed impairments or explaining his reasoning"). We disagree. The ALJ stated that the mental impairments Dr. Cohen diagnosed, whose testimony he credited, did not meet or medically exceed the listed mental impairments in Appendix A, Subpart P, Regulations No. 4. Tr. at 22. He documented the mental impairments he found on the OHA

(continued...)

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<sup>1</sup>(...continued)  
Psychiatric Review Techniques Form accompanying the decision.  
Tr. at 27-31.

A. Simple and Routine Work

Substantial evidence supported the ALJ's finding that mental impairments did not prevent Mary Ingram from performing simple and routine tasks.

Mary Ingram was age 45, and therefore a "younger person" under the Social Security Act. See 20 C.F.R. § 404.1563(c) (stating that "If you are a younger person (under age 50), we generally do not consider that your age will seriously affect your ability to adjust to other work"). Ingram is a high school graduate and has worked seven years as a nursing assistant. See Tr. at 37, 52. "The claimant testified that she is solely responsible for the care of her bedridden daughter, except for some help from visiting nurses," the ALJ observed, and "[t]his indicates that the claimant is capable of performing a wide variety of tasks in what is surely a highly stressful situation." Tr. at 21.

Dr. Cohen, the expert medical witness who appeared at the hearing, testified that although Ingram is 'moderately' restricted in maintaining activities of daily living and 'moderately' socially isolated, and has deficiencies in concentration, she is nonetheless able to function socially. Tr. at 47-50. He testified that she does not have major depression, but giving her "the benefit of the doubt," she had "A typical depression". Tr. at 47. Dr. Cohen offered the medical opinion that Ingram is able to "carry out a low stress job doing simple tasks." Tr. at 48. Other expert witnesses confirmed this

medical opinion. E.g. Tr. at 179-81, 183-85, 235-36. Indeed, none of Ingram's treating physicians vitiated it.<sup>2</sup>

The ALJ thus found that "the claimant has the residual functional capacity to perform work activities at all exertional levels, but is limited to performing simple, routine work in a low stress environment." Tr. at 23. Coupled with the vocational expert's uncontested testimony that applicable jobs exist in the national economy, such as packer, office cleaner, and sorter, the ALJ reasonably found that Ingram could fulfill the requirements of substantial gainful work.

#### B. Regular and Continuous Work

The ALJ's concomitant conclusion -- that Mary Ingram was able despite her impairments to work on "a regular and continuing basis," 20 C.F.R. § 416.945(c) -- was also adequately supported. The ALJ addressed this issue specifically:

I note that the claimant's representative asked Ms. Kelley [vocational expert] whether someone who could not be punctual or maintain attendance would be capable of performing jobs, to which Ms. Kelley replied in the negative. However, the claimant's representative has not established that the claimant has such limitations, so I am not giving any weight to Ms. Kelley's responses.

The record indicates that the reason the claimant is not working is in order to care for

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<sup>2</sup> A terse letter by Dr. Graham may be the exception, but the ALJ permissibly disregarded it. Tr. at 22 ("Dr. Graham has provided no notes. It is not possible to determine the length of the treatment relationship, frequency of examinations, or the nature and extent of the treatment relationship. Therefore, I cannot give any weight to this assessment.").

her daughter, not because of her own illness. While it is unfortunate that the claimant['s] responsibilities prevent her from working, she cannot be granted disability.

Tr. at 24. In other words, the ALJ found that Mary Ingram did not establish a factual predicate for Kelly's expert testimony. This finding is well supported. The only solid evidence in the record regarding Mary Ingram's ability to work regularly and continuously being severely hampered by mental impairments is the evaluation of a single Social Security agency consultant, Katie Roby. After interviewing Ingram, Dr. Roby answered in response to a question on a Psychiatric Activities Assessment form that Ingram's "ability to maintain regular attendance" was "poor." Tr. at 217. The ALJ was entitled to conclude that the opinion of one out of seven medical or expert witnesses did not convincingly demonstrate an attendance-limiting impairment.

Furthermore, the opinion of Dr. Roby was contradicted by that of other agency experts, who opined that Ingram could regularly and continuously engage in work. See Tr. at 179, 184 (state agency consultants independently characterizing Ingram's attendance as "not significantly limited"). The expert testimony of Dr. Cohen was unavailing; the doctor's testimony was opaque on the matter,<sup>3</sup> and when plaintiff's attorney pressed Dr. Cohen to elicit testimony touching the issue of whether Ingram could

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<sup>3</sup> See Tr. at 48 ("Her difficulties in maintaining social function are moderate. Her deficiencies in concentration, persistence and pace are often. Her episodes of deterioration or decompensating in a work or work like setting are never.").

regularly and continuously engage in work, Dr. Cohen resisted diagnosing an impairment that seriously affected attendance.<sup>4</sup> Ingram's treating physicians did not describe attendance-limiting impairments. The ALJ also reasonably concluded that Mary Ingram in her own testimony did not demonstrate the inability to regularly and continuously attend work. See, e.g., Tr. at 41-46 (supplying conclusory, and arguably evasive, responses to questions concerning capacity to report to work).

Our review of the record shows that Mary Ingram experienced significant, perhaps profound, psychological stressors<sup>5</sup>. The record may be susceptible to a finding that Mary Ingram's mental limitations made her unable to comport with the regular attendance requirements of a job. But we find the record more readily susceptible to the opposite conclusion, i.e., the one the ALJ found. We will not re-weigh the evidence nor make our own findings by a preponderance of the evidence about what the record showed. Hartranft, 181 F.3d at 360.

For the foregoing reasons, we will sustain the Commissioner's objections to the Report and Recommendation and

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<sup>4</sup> Counsel asked Dr. Cohen whether Ingram might be "more than moderate[ly] socially isolated." Dr. Cohen replied that she was not. Tr. at 49-50. Counsel asked Dr. Cohen how often Ingram experienced lapses in concentration, to which Dr. Cohen responded: "Often isn't meant as a percentage, it's meant more in terms of a, of a scale of how her concentration is. That's not a fair question." Tr. at 51.

<sup>5</sup> Dr. Streets and other witnesses observed the serious "psychological stressors" that Ingram faced, including, the terminal illness of her daughter, the death of her brother, and unemployment. Tr. at 236; see also Tr. at 181, 185.

affirm the decision of the Commissioner. An appropriate Order and Judgment will follow.

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ORDER

AND NOW, this 20th day of December, 2001, upon consideration of the parties' cross-motions for summary judgment, and upon review of the Report and Recommendation of the Honorable Charles B. Smith, United States Magistrate Judge, and defendant's objections to the Report and Recommendation, and after a careful and independent review of the record, and the Court finding that:

(a) In his Report and Recommendation, Judge Smith recommends that we deny the parties' cross-motions for summary judgment and remand to the Commissioner for further development of the factual record explaining "At this time, there remains a question whether plaintiff could hold a job on a 'regular and continuous' basis as the social security regulations require. There has been no independent medical examination of the plaintiff since at least 1998. A more current independent examination is necessary upon remand in order for the ALJ to

better determine plaintiff's present mental status and her ability to work on a 'regular and continuing basis,'" R&R at 11 (footnote omitted);

(b) To review, the Administrative Law Judge (ALJ) had found:

(i) Mary Ingram suffered from several mental impairments: severe atypical depression, personality disorder, and adjustment disorder;

(ii) She was unable to return to her former job as a nursing aid; however,

(iii) She was not disabled because she was able to engage in other kinds of substantial gainful employment, specifically, she was able "to perform the nonexertional requirements of simple, routine work in a low stress environment" enabling her to perform such jobs as cleaner, sorter, and packer, under 20 C.F.R. § 404.1545 and 20 C.F.R. § 416.945;

(c) Judge Smith noted that under 20 C.F.R. §§ 404.1545 and 416.945, the federal regulations governing when a claimant suffering from a mental or physical impairment who cannot resume her former job possesses sufficient "residual functional capacity" to engage in other substantial gainful employment, the Commissioner must determine whether the claimant retains the "capacity for work activity on a regular and continuing basis," 20 C.F.R §§ 404.1545(c), 416.945(c), R&R at 11 & n.4<sup>6</sup>;

(d) Judge Smith observed that while the Commissioner rendered a fact finding that Mary Ingram's mental impairments limited her to performing simple, routine work in a low stress environment, he did not render any finding as to whether Mary Ingram could sustain such work, or sustain work of any kind, regularly and continually;

(e) Magistrate Judge Smith deemed the record to be incomplete on the matter and recommended remand for development of the factual record, and we note,

(i) Mary Ingram testified she has blackouts and had difficulties with short-term memory;

(i) Dr. Katie Roby, Ph.D, who conducted a clinical psychological disability evaluation of the plaintiff for the Pennsylvania Bureau of Disability Determination, concluded on her Psychiatric Activities Assessment that Mary Ingram's "ability to perform activities within a schedule" and "ability to attend to a task from beginning to end" were "fair to poor" and, furthermore, her "ability to maintain regular attendance" was "poor," Tr. 214-17, R&R at 6;

(ii) Expert medical witness, Dr. Richard Cohen, testified at the administrative law hearing that Ingram's "deficiencies in concentration, persistence and pace are often," Tr. 48, R&R at 8; and

(iii) Beth Kelly, vocational expert, testified that the inability to sustain regular attendance interferes with the capacity to be gainfully employed;

(f) We review objected-to portions of a magistrate judge's report and recommendation under a de novo standard, 28 U.S.C. § 636(b)(1)(b), and we review the factual findings of the Commissioner of Social Security under a substantial evidence standard, 42 U.S.C. § 405(g) (discussing standard of review of the district court in social security matters and stating that the "findings of the commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive"); see also Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986) (noting that the role of the district court is to determine whether the Commissioner's decision is supported by substantial evidence)<sup>7</sup>;

(g) The Commissioner argues in her objections that substantial evidence existed to support the finding of the ALJ that Mary Ingram was able to fulfill gainful employment, and, in particular, work on a regular and continual basis, because,

(i) Dr. Roby's rating of Ingram's ability to sustain normal attendance as poor was "singular and unexplained";

(ii) Neither the medical expert nor Mary Ingram's treating sources identified a problem with regular attendance;

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<sup>7</sup> Substantial evidence "does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999) (internal quotation marks omitted). We will not set aside the Commissioner's decision if it is supported by substantial evidence, even if we would have decided the factual inquiry differently, id.

(iii) "A poor ability to maintain regular attendance is not necessarily inconsistent with an ability to perform low stress jobs," Obj. at 3; and

(iv) "Plaintiff's only apparent barrier to her regular and continuous work attendance," according to the defendant, "would be her status as a caretaker for her disabled daughter. Her status as a caretaker alone belies an assertion that Plaintiff could not maintain regular attendance since she is the sole and daily caretaker for her daughter. Plaintiff's regular and unerring ability to solely care for her daughter surely supports a finding that she can maintain regular work attendance," Obj. at 4-5;

(h) The difficulty with these arguments is that the ALJ did not make a factual finding that Mary Ingram is able to work regularly and continuously;

(i) The ALJ found that Mary Ingram is limited to performing simple, routine work in a low stress environment, Tr. 23, credited the vocational expert's testimony that that type of work exists in jobs such as cleaner, sorter, and packer, and then concluded that Mary Ingram is able to engage in "substantial gainful employment" precluding the classification of her mental impairments as a "disability" under the Social Security Act, see 42 U.S.C. § 423(d), without determining that she is able to perform work regularly and continuously;

(j) Under 20 C.F.R. §§ 404.1545 and 416.945, the regulations defining when an individual is able to perform

substantial gainful activity,<sup>8</sup> the Commissioner must assess whether an individual retains residual capacity to work "on a regular and continuing basis," id. at §§ 404.1545(c), 416.945(c); see Kangas v. Brown, 823 F.2d 775, 777 (3d Cir. 1987) ("The regulations defining residual functional capacity direct the Secretary to determine a claimant's capacity for work on a 'regular and continuing basis.'");

(1) The burden is not upon the claimant, but upon the Commissioner, to prove that a claimant can perform substantial gainful activity and, thus, work on a substantial and continuing basis, supra at (k); as the Court of Appeals for the Third Circuit stated,

This [] method of proving disability requires that the claimant first demonstrate that he is unable to return to work in his former job because of physical or mental impairments. Once a claimant has proved that he is unable to perform his former job, the burden shifts to the Secretary to prove that there is some other kind of substantial gainful employment he is able to perform....

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<sup>8</sup> See 42 U.S.C. § 423(d)(4) (stating, "The Secretary shall by regulations prescribe the criteria for determining when services performed or earnings derived from services demonstrate an individual's ability to engage in substantial gainful activity"); Kangas v. Bowen, 823 F.2d 775, 777(3d Cir. 1987) (referring to regulation defining residual capacity to engage in work, 20 C.F.R. § 404.1545, to determine whether individual can engage in substantial gainful activity); 42 U.S.C. § 404.1545(a) ("Your residual functional capacity is what you can still do despite your limitations....This assessment of your remaining capacity for work is not a decision on whether you are disabled, but is used as the basis for determining the particular types of work you may still able to do despite your impairment(s). Then, using the guidelines in §§ 416.90 through 416.969a, your vocational background is considered along with your residual functional capacity in arriving at a disability determination or decision."); 20 C.F.R. § 404.1545(a) (same).

Id. at 777 (citation omitted);

(m) Mary Ingram met her burden of proving that she is unable to return to her former job, Tr. 24, placing the burden of demonstrating that other jobs exist that she can perform despite her impairment on the Commissioner;

(n) The ALJ reversed the burden of proof, assuming that Ingram was able to work regularly and continuously because she failed to prove she could not:

I note that the claimant's representative asked Ms. Kelley whether someone who could not be punctual or maintain attendance would be capable of performing jobs, to which Ms. Kelley replied in the negative. However, the claimant's representative has not established that the claimant has such limitations, so I am not giving any weight to Ms. Kelley's responses.

Tr. at 24<sup>9</sup>; and

(o) Given that the ALJ did not make a finding that the claimant, Mary Ingram, is able to work on a regular and continuous basis, and, thus, able to engage in substantial gainful employment, and given that there is evidence in the record that suggests she could not and also evidence that suggests she could, compare supra at ¶ (e) and supra at ¶ (g), we

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<sup>9</sup> While it is true that it is the claimant's burden to prove that she has an impairment and the nature of her impairment, it is not true that she had not submitted proof that she had limitations on her ability to perform regular work. Rather, there was some evidence in the record, see, e.g., supra at ¶ (e), suggestive that Mary Ingram's mental impairments inhibited her ability to perform a regular job. That evidence, and countervailing evidence, deserved consideration. The ALJ's glancing consideration of Ingram's mental ability to work regularly and continuously in which he ignored evidence pertinent to a limitation, even when a vocational expert testified that attendance difficulties are preclusive of substantial gainful employment, compels our remand.

shall remand the matter to the Commissioner for clarification of whether or not Mary Ingram is presently able to work on a regular and continuing basis and to take any further evidence as she deems necessary;

Thus, it is hereby ORDERED that:

1. Defendant's Objections are GRANTED IN PART;
2. The Report and Recommendation is APPROVED AND ADOPTED IN PART;
3. Plaintiff's motion for summary judgment is DENIED;
4. Defendant's motion for summary judgment is DENIED;
5. The matter is REMANDED to the Commissioner for the limited purpose of determining whether Mary Ingram is presently able to perform work on a regular and continuing basis and the Commissioner shall take any additional evidence appropriate to that finding; and
6. The Clerk shall CLOSE this case statistically.

BY THE COURT:

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Stewart Dalzell, J.

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